No. 96-651

Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. GILBERT, *et al.*,
Petitioners,

v.

RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether suspension without pay of public employees must in all instances be preceded by notice and an opportunity to be heard.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
THE DUE PROCESS CLAUSE DOES NOT REQUIRE A PUBLIC EMPLOYER TO PROVIDE A HEARING PRIOR TO SUSPENDING AN EMPLOYEE WITHOUT PAY IN EVERY CASE, PARTICULARLY WHEN THERE IS AN INDEPENDENT SOURCE OF PROBABLE CAUSE TO BELIEVE THAT THE EMPLOYEE IS UNFIT FOR CONTINUED SERVICE	7
A. The Due Process Clause Does Not Require A State To Provide Pre-Deprivation Process When Important Public Interests Are Affected	9
B. *Loudermill* Should Not Be Extended To Require That All Summary Suspensions Be With Pay	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases — Page

Barry v. Barchi, 443 U.S. 55 (1979) 11, 13, 14, 15
Boddie v. Connecticut, 401 U.S. 371 (1971) 10
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 9-10
Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 936 (1992) 8
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 11
Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) 8, 9, 10, 18
Dixon v. Love, 431 U.S. 105 (1977) 11, 12, 14
Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 11, 12, 12-13
FDIC v. Mallen, 486 U.S. 230 (1988) ..... *passim*
Goss v. Lopez, 419 U.S. 565 (1975) 11, 11-12
Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1981) 11, 12
Lawton v. Steele, 152 U.S. 133 (1894) 11
Mackey v. Montrym, 443 U.S. 1 (1979) 11, 12
Mathews v. Eldridge, 424 U.S. 319 (1976) 6, 9-10, 10, 15
Morrissey v. Brewer, 408 U.S. 471 (1972) 10
North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) 11, 13

Statutes

30 U.S.C. § 1291(8) 12

Other Authorities

Black's Law Dictionary (6th ed. 1990) 17-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-651

JAMES E. GILBERT, *et al.*,
Petitioners,

v.

RICHARD J. HOMAR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici* and their members have an especially strong interest in legal issues affecting public sector labor relations.

The court of appeals held that "suspension without pay must be preceded by notice and an opportunity to be heard in all instances." Pet. App. 11a. This rigid *per se* rule applies regardless of the weight and source of the evidence against the employee and the importance of the governmental interests implicated by the employee's misconduct. Here, for example, the court of appeals held that state officials violated the Due Process Clause when they suspended a university police officer on the basis of his arrest by state police during a drug raid. In the court of appeals' view, due process requires in all cases that a public employer provide either a pre-suspension hearing or continue payment of salary until a hearing is provided; the employer's provision of timely post-deprivation process is irrelevant.

The lower court's holding cannot be squared with the extensive line of cases in which this Court has upheld the government's authority to use summary procedures to protect important interests, provided adequate post-deprivation process is available. Moreover, the purpose served by a pre-suspension hearing is to protect against unwarranted decisions; where, as here, a public employer's suspension decision is based on a finding of other independent authorities, it is unreasonable to require employers to provide pre-deprivation process.

Because of the importance of the question presented to *amici* and their members, this brief is submitted to assist the Court in the resolution of this case.[1]

STATEMENT

Respondent Richard J. Homar was employed as a police officer by East Stroudsburg State University (ESU). On the morning of August 26, 1992, Homar was arrested by the Pennsylvania State Police during a drug raid of the apartment of James Compton. Pet. App. 49a. A state police officer interviewed Homar that day, and the next day filed a supplemental report stating that Homar admitted knowing that Compton and another individual, Joseph Habhab, were marijuana dealers and that Habhab had provided Homar with marijuana for his personal use. *Id.* at 50a-51a.

On the day of Homar's arrest, the state police called petitioner David Marazas, Chief of the ESU police force, to inform him that Homar had been arrested and charged with various drug offenses. *Id.* at 49a. Marazas informed petitioner Gerald Levanowitz, ESU's Director of Human Resources, who decided to suspend Homar immediately without pay. *Id.* at 50a. Homar did not report for his shift that day. *Id.*

The next day, Homar called Marazas to inform him of his arrest and to ask if he was suspended. *Id.* Marazas informed Homar that he was suspended and would receive a suspension letter later in the day. *Id.* The letter stated that Homar was suspended

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

pending further investigation and that ESU's final decision would not necessarily coincide with the resolution of the criminal charges. *Id.*

After the criminal charges against Homar were dropped, Levanowitz continued to investigate the incident, meeting with the state police. *Id.* at 52a. According to Levanowitz's notes, one of the troopers told him that during the raid, "a metal plate used for processing and cutting marijuana" was observed in Homar's vicinity. *Id.* at 53a. Two of the troopers told Levanowitz that they observed "four marijuana 'joints' on the coffee table where Homar had been sitting and one of the joints was half burned and that there was a heavy odor of marijuana smoke in the house." *Id.* at 53a.

At a meeting conducted on September 18th, Levanowitz advised Homar " 'that the State Police had given [him] some evidence very serious in nature,' " *id.* at 54a (quoting Levanowitz Dep. at 48), and requested Homar's " 'side of the story.' " *Id.* (quoting Dkt. Entry #22, at § 24). Levanowitz, however, did not disclose during the meeting that he had received a copy of the supplemental report, which contained the admissions Homar had made when interviewed by the state police on the day of his arrest. *Id.* In his letter demoting Homar, Levanowitz stated that his decision was based on the admissions Homar made to the state police. *Id.* at 55a.

Homar's union representatives subsequently asked petitioner James Gilbert, President of ESU, for a meeting. *Id.* at 56a. By the time of the meeting, which was held on September 24, Homar had obtained a copy of the supplemental report. *Id.* At the meeting with President Gilbert, Homar was accompanied by two union officials, Connell and Pottiger. *Id.* at

56a-57a. Pottiger subsequently "affirmed that Gilbert provided Homar with a full opportunity to respond to the charges and the discipline Levanowitz imposed." *Id.* at 57a (citing Pottiger Dep. at 22). At Homar's request, President Gilbert conducted part of the meeting without Levanowitz being present. *Id.* President Gilbert sustained Homar's demotion. *Id.*

Homar then challenged his demotion under the grievance procedures in the collective bargaining agreement. *Id.* Both the State System of Higher Education (step 3) and the Commonwealth's Office of Labor Relations (step 4) denied Homar's grievance. *Id.* Homar's union had the right to pursue arbitration but chose to withdraw the matter, whereupon Homar commenced this suit. *Id.*

SUMMARY OF ARGUMENT

1. The court of appeals held that a public employer must in all instances provide notice and a hearing prior to suspending an employee without pay. This rule is irreconcilable with this Court's flexible approach to due process and its longstanding recognition of governmental authority to use summary procedures to protect important public interests as long as there is adequate post-deprivation process.

The Court has routinely upheld the use of summary procedures when public safety interests are implicated. It has also upheld the use of such procedures to protect public confidence in non-governmental institutions including banking and horse racing. The governmental interest implicated here—preserving public confidence in the integrity of police officers—is, as the court of appeals recognized, "compelling" and justifies the summary suspension which the Uni-

versity imposed on respondent after he was arrested in a drug raid.

Contrary to the court of appeals, due process did not require the University to continue paying respondent until he received a hearing. The Court's cases recognize that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action. For example, in *FDIC v. Mallen*, 486 U.S. 230 (1988), the Court upheld the summary suspension of a bank officer for up to ninety days notwithstanding that the deprivation denied him the right to work in his chosen profession and possibly imposed significant financial hardship. The University did not violate Homar's procedural due process rights when it provided a hearing four weeks after it suspended him without pay.

Moreover, the purpose of a pre-suspension hearing is to prevent erroneous deprivations. The Court, however, has recognized that where there is "a substantial assurance that the deprivation is not baseless or unwarranted," *id.* at 240, additional pre-deprivation process is not required because it is of little "probable value" in preventing "an erroneous deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As the court of appeals acknowledged, Homar's arrest provided a substantial assurance that his suspension was "not baseless or unwarranted." Pet. App. 11a. Due process thus did not require the University to provide a pre-suspension hearing.

2. The court of appeals' extension of *Loudermill* to require in all cases that public employers provide notice and a hearing before suspending an employee without pay is ill-conceived. Where, for example, authorities independent of the workplace determine

that there is probable cause to believe that an employee has committed an offense demonstrative of an employee's lack of fitness for continued employment, public employers should be able to rely on that determination to suspend without a hearing. Such a determination provides a substantial assurance that the employer's suspension decision is warranted and serves as an adequate substitute for a *Loudermill* hearing.

Moreover, where independent authorities have filed criminal or administrative charges, a pre-deprivation hearing can be a trap for the unwary as employees make either incriminating admissions or statements which can be used to impeach them in the criminal or administrative proceeding. Finally, public employers have numerous incentives to make considered and correct suspension decisions. Suspension decisions are disruptive and costly; an employer is likely to incur litigation costs, overtime payments, and training costs. The employer also bears the risk of a backpay award if the suspension is not upheld. It is thus unnecessary to require public employers to provide a pre-suspension hearing in all cases.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE A PUBLIC EMPLOYER TO PROVIDE A HEARING PRIOR TO SUSPENDING AN EMPLOYEE WITHOUT PAY IN EVERY CASE, PARTICULARLY WHEN THERE IS AN INDEPENDENT SOURCE OF PROBABLE CAUSE TO BELIEVE THAT THE EMPLOYEE IS UNFIT FOR CONTINUED SERVICE

The court of appeals created a rule applicable "in all instances," Pet. App. 11a, "that a governmental employer may not suspend an employee without pay

unless that suspension is preceded by some kind of pre-suspension hearing." *Id.* at 14a. This rigid rule is irreconcilable with this Court's flexible approach to due process and its longstanding recognition of governmental authority to use summary procedures—subject to adequate post-deprivation process—where important public interests are at stake.

Here, the court of appeals acknowledged "that there was a compelling governmental interest which supports ESU's decision to suspend Homar immediately and without a hearing pending further investigation." *Id.* at 11a. It also observed that "[t]he university has a substantial interest in maintaining public confidence in the ESU police force, and Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court." *Id.* (citing *FDIC v. Mallen*, 486 U.S. 230, 240 (1988)). It further noted that "[i]n circumstances where public safety is implicated, '[n]ot even an informal hearing . . . must precede a deprivation.'" *Id.* (quoting *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 936 (1992)).

The court of appeals nonetheless held "that Homar's due process rights were violated because he was suspended *without pay*." Pet. App. 11a. According to the court, in *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), this Court "noted that it had 'frequently recognized the severity of depriving a person of the means of livelihood.'" Pet. App. 11a (quoting 470 U.S. at 543). And invoking dictum, the court asserted that *Loudermill* "explained that, while . . . there were some limited instances in which a strong governmental interest might warrant immediately

removing a person from a position without a hearing, 'in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem *by suspending with pay*.'" *Id.* (quoting 470 U.S. at 544-45) (emphasis added by court of appeals). The court thus held that "a governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." *Id.* at 14a.

As the underlying facts of this case demonstrate, the court of appeals' rigid *per se* rule applies regardless of the seriousness of the employee's misconduct, its nexus to compelling public interests, and the strength of the evidence against the employee. Where, as here, substantial evidence of employee misconduct probative of a lack of fitness or trustworthiness for a position has been established by authorities independent of the workplace, there is "a substantial assurance that the deprivation [is] not baseless or unwarranted," Pet. App. 30a (Alito, J., dissenting), and a pre-suspension hearing is unnecessary. Because the University timely provided a full range of post-deprivation procedures to correct any error, respondent received all the process he was due. The Court should therefore reverse the judgment of the court of appeals.

A. The Due Process Clause Does Not Require A State To Provide Pre-Deprivation Process When Important Public Interests Are Affected

This Court has long recognized that "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews v. Eldridge*, 424

U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, " 'due process is flexible and calls for such procedural protections as the particular situation demands.' " *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). In determining what process is due one who has been deprived of a constitutionally cognizable interest, the Court has accordingly instructed that "three distinct factors" be considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. *See also Loudermill*, 470 U.S. at 542-43.

While the Due Process Clause ordinarily requires " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,' " *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)), there are "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie*, 401 U.S. at 379. *See also Loudermill*, 470 U.S. at 542 n.7 ("There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements."). In a long line of cases, the Court has thus upheld the deprivation of a wide variety of property interests prior to notice and hear-

ing when necessary to protect important public interests, as long as an adequate post-deprivation remedy is provided. *See Mallen*, 486 U.S. at 240-41 (suspension of indicted bank president); *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 299-303 (1981) (order to cease strip mining); *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979) (suspension of horse trainer's license); *Mackey v. Montrym*, 443 U.S. 1, 11-19 (1979) (suspension of driver's license); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977) (same); *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) (suspension of public school students); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 (1950) (seizure of misbranded articles); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315-20 (1908) (seizure and destruction of food unfit for human consumption); *Lawton v. Steele*, 152 U.S. 133, 139-42 (1894) (seizure and destruction of fishing nets used in violation of state law); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80 (1974) (upholding summary seizure of yacht to enable government to assert *in rem* jurisdiction).

In these cases, the Court has repeatedly recognized that pre-deprivation procedures are not required when public safety interests are implicated. Thus, the Court in *Goss*, while holding that the Due Process Clause usually requires school administrators to provide a hearing prior to suspending a student for disciplinary violations, nonetheless recognized "that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or

property or an ongoing threat of disrupting the academic process may be immediately removed from school." 419 U.S. at 582.

Other cases reflect a similar concern. In *Hodel*, the Court upheld the federal government's authority to summarily order the cessation of strip mining to protect against " 'imminent danger to the health and safety of the public.' " 452 U.S. at 301 (quoting 30 U.S.C. § 1291(8)). The Court observed that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action," and that the "deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Id.* at 300 (quoting *Ewing*, 339 U.S. at 599).

In *Mackey*, the Court upheld the summary suspension of a driver's license for failure to submit to a breathylyzer test, observing that "[w]e have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety." 443 U.S. at 17. And in *Dixon*, the Court upheld the summary suspension of a driver's license for accrual of too many points for traffic law violations within a given time period, noting "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." *See* 431 U.S. at 113. *Ewing* and *North American Cold Storage*, which upheld the government's authority to seize items injurious to the public without first providing notice and hearing, likewise reflect an acknowledgement that the protection of important public safety interests requires that the government be able to act first and provide due process later. *See Ewing*,

339 U.S. at 599-600; *North American Cold Storage*, 211 U.S. at 320 (where post-deprivation remedy available, "due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing").

The Court's extensive line of cases upholding the government's authority to use summary procedures makes clear two additional points of import for this case. First, the government's authority to use summary procedures is not limited to those instances in which the deprivation is necessary to protect against physical harm. Both *Mallen*, which upheld the summary suspension of an indicted bank officer "to protect the interests of depositors and to maintain public confidence in . . . banking institutions," 486 U.S. at 241, and *Barchi*, which upheld the summary suspension of a horse trainer's license to preserve "the integrity of the racing carried on under [the State's] auspices," 443 U.S. at 64, demonstrate that preserving the public trust in even non-governmental institutions and activities is a substantial enough interest to warrant a State's use of summary procedures. It is indisputable that the government's interest in preserving the public trust in the integrity of law enforcement personnel is as weighty an interest as preserving public confidence in banks or the integrity of horse racing.

Second, *Mallen* and *Barchi* demonstrate that even as substantial an interest as maintaining one's livelihood must at times yield to the government's interest in taking prompt action to preserve the public trust. Both the State's imposition of a short term suspension of a horse trainer's license and the FDIC's suspension of a bank president from his duties for up to

ninety days denied these persons the right to work in their chosen professions and possibly imposed significant financial hardship. *See Barchi*, 443 U.S. at 66; *Mallen*, 486 U.S. at 243; *see also* Brief of Appellee, *Mallen*, No. 87-82, at 7-8. Moreover, while the provision of post-deprivation process might result in the restoration of the trainer's license in *Barchi* or the termination of the bank officer's suspension in *Mallen*, due process has never been held to require the government to compensate for any economic loss occasioned by its use of summary procedures. This stands in stark contrast to the process respondent received, which provided back pay notwithstanding that petitioners were, as the court of appeals acknowledged, justified in imposing an immediate suspension, Pet. App. 11a, which was subsequently upheld at every stage of appeal. *Id.* at 57a.

The court of appeals' holding "that suspension without pay *must* be preceded by notice and an opportunity to be heard *in all instances*," Pet. App. 11a (emphasis added), cannot be reconciled with these cases. It ignores that the Court has repeatedly upheld the government's authority to take summary action depriving persons of property interests which are the functional equivalent of the loss of remuneration suffered by respondent here. *See Mallen*, 486 U.S. at 240-41, 243; *Barchi*, 443 U.S. at 64-65; *Love*, 431 U.S. at 110 (driver's license of truck driver). It ignores that the Court has upheld such deprivations to protect governmental interests which, while substantial, are arguably not of the same magnitude as what the court of appeals acknowledged was the "compelling governmental interest" in maintaining public confidence in the university's police force "which support[ed] ESU's decision to suspend Homar immedi-

ately and without a hearing pending further investigation." Pet. App. 11a. It ignores that in this case there was a period of only four weeks between the initial deprivation and the post-deprivation process, and that the process the State provided included the remedy of back pay.

It further ignores that in this case, there was ample evidence—which was developed independently of the workplace—demonstrating that "there [was] little likelihood that the deprivation is without basis." *Mallen*, 486 U.S. at 244. Like the indictment in *Mallen* and the drug test in *Barchi*, the probable cause established by Homar's arrest on drug charges by the state police was more than enough to establish his lack of fitness to serve as a police officer pending further investigation.

Indeed, even the court of appeals acknowledged that "Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted." Pet. App. 11a. It nonetheless held that ESU was required to provide a pre-deprivation hearing. The very foundation of the Court's holdings authorizing summary suspensions in both *Mallen* and *Barchi* is that where there is "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," additional pre-deprivation process is unnecessary. *Mallen*, 486 U.S. at 240; *see also Barchi*, 443 U.S. at 64-65 ("whenever [the State] has satisfactorily established probable cause . . . there is substantial assurance that the trainer's interest is not being baselessly compromised"). This is because it would be of little "probable value" in preventing "an erroneous deprivation." *Mathews*, 424 U.S. at 335. Because there was a "substantial assurance"

that ESU's decision to suspend Homar was "not baseless or unwarranted," the Due Process Clause did not require a pre-suspension hearing. *Mallen*, 486 U.S. at 240.

B. *Loudermill* Should Not Be Extended To Require That All Summary Suspensions Be With Pay

The court of appeals' extension of *Loudermill* to impose a rigid *per se* rule requiring public employers to provide notice and a hearing before suspending without pay is thus at odds with this Court's more flexible conception of due process. Due process does not require that public employees receive notice and a pre-deprivation opportunity to respond in all cases. Such a rule is not only unnecessary, it would impose substantial costs on public employers.

An employee's interest in not being arbitrarily deprived of a job and its salary is, of course, substantial. The Due Process Clause, however, does not require process simply for its own sake but rather to reduce the risk of arbitrary and erroneous decision-making. Thus, while a *Loudermill* hearing may serve this valuable purpose in many instances, such will not always be the case. Where, for example, "an independent body," whether it be the police, a grand jury, or a drug testing lab, "has determined that there is probable cause to believe" that an employee has committed an offense and that offense demonstrates a lack of fitness for continued employment, there is a "substantial assurance" that the suspension is "not baseless or unwarranted" and a pre-suspension hearing should not be constitutionally required.[2] *Mallen*,

---

[2] This listing of independent authorities is not exclusive. For example, a government lawyer might be accused of ethical violations by a state ethics board, a government physician might be accused of malpractice by a state licensing

486 U.S. at 240, 244-45. In such circumstances, public employers are entirely justified in relying on the determinations made by other authorities; only in rare cases would providing an opportunity to respond at this stage be likely to yield information that would cause a public employer to alter a suspension decision.

Moreover, where an employer takes disciplinary action based on the filing of criminal or administrative charges by other authorities, a pre-deprivation opportunity to respond can be a trap for the unwary rather than a meaningful hearing. During the course of such a hearing, an employee might well make either incriminating admissions or statements which could be used to impeach their testimony in a criminal or administrative proceeding. Those employees who are aware that a statement made to an employer can be used against them in proceedings which could result in imprisonment or the loss of a professional license are not likely to avail themselves of this "opportunity."

It is especially unreasonable to impose such a rule where independent authorities have established probable cause that an employee has engaged in misconduct, which, if proved, would be punishable by a suspension or termination from employment. The very definition of probable cause is that reasonable people would believe it more likely than not that the person committed the offense. *See, e.g.*, Black's Law Dic-

---

board, and the captain of a government operated ferry might be subjected by the Coast Guard to a license revocation proceeding for being intoxicated while on duty. In each case, a public employer would have a reasonable basis for suspending an employee without pay and without a pre-suspension hearing.

tionary 1201 (6th ed. 1990). If it is objectively more likely than not that an employee committed an offense punishable by suspension without pay or outright termination, it is not reasonable to require governmental employers to continue to pay the employee. Indeed, the court of appeals' rule would frequently result in undeserved windfalls to employees because whenever an employee's termination is ultimately upheld, the costs of filing a suit to recover pay will prevent the government from seeking restitution. On the other hand, where the charges against the employee are dismissed in a post-deprivation proceeding, the employee can be made whole through the remedy of back pay.

Public sector employers do not take lightly the decision to suspend an employee. Suspending an employee is frequently both disruptive, *see Loudermill*, 470 U.S. at 544, and costly: the employer is likely to incur substantial litigation costs, overtime payments to other employees who must shoulder the burden formerly carried by the suspended employee, and the costs of training a replacement. Moreover, the employer risks a back pay award for a period in which it has received no work in return. These consequences, along with the desire of public employers to be fair to their employees, provide a very strong inducement to make considered and correct suspension decisions. Such incentives, coupled with an independent authority's probable cause finding, demonstrate the unreasonableness of the court of appeals' rule.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

February 10, 1997